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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

DAVID MICHAEL ADCOCK,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

ALFREDO G. PARRISH
906 Savings & Loan Bldg.
Des Moines, IA 50309
515-244-5737

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether petitioner's Fifth and Fourteenth Amendment rights were violated when his motion for separate trial was denied by the trial court?

2. Whether petitioner's Sixth Amendment right of confrontation was violated when the trial court overruled his request to further cross-examine a state rebuttal witness and refused to allow his motion to call this witness as an adverse or rebuttal witness for the defense.

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TO THE SUPREME COURT OF THE
STATE OF IOWA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

David Michael Adcock, petitioner herein, prays that a writ of certiorari issue to review the judgment of the

Court of Appeals of the State of Iowa entered in the above case on February 5, 1980, Petition for Further Review having been denied by the Iowa Supreme Court on April 4, 1980.

OPINIONS BELOW

The opinion of the Iowa Court of Appeals is not reported and is contained in Appendix A, infra, App. A-2. The order of the Iowa Supreme Court denying further review is not reported and is contained in Appendix A, infra, App. A-28. Petitioner was tried and convicted in the Iowa District Court for Polk County by a jury, and there is no opinion of that court.

JURISDICTION

The judgment of the Iowa Court of Appeals was entered on February 5, 1980; further review was denied

by the Iowa Supreme Court on April 4, 1980. The jurisdiction of the Supreme Court is invoked under the provisions of Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth and Fourteenth Amendment rights were violated when his motion for separate trial was denied by the trial court?

2. Whether petitioner's Sixth Amendment right of confrontation was violated when the trial court overruled his request to further cross-examine a state rebuttal witness and refused to allow his motion to call this witness as an adverse or rebuttal witness for the defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of the United States Constitution and statutes of the State of Iowa are set forth in Appendix B at page App. B-2.

STATEMENT

This case arises from the conviction of David Michael Adcock of the crime of Sexual Abuse in the Second Degree in violation of Section 709.3 of the 1979 Code of Iowa. He had been charged with this offense by a Polk County, Iowa, County Attorney's Information. Prior to trial of this matter, the State of Iowa moved to amend petitioner's trial information and moved for a joint trial of David Michael Adcock with two co-defendants, Jack Eldridge and Glenn Nuckolls, who were charged with the same offense. Petitioner's trial attorney did not resist said

motion for joint trial, which was sustained by the trial court. Only defendant Eldridge's attorney resisted consolidation. Prior to selection of the jury, Petitioner's attorney, along with co-defendants' attorneys, moved for severance of the trial. All three defendants testified during the trial and certain hearsay statements made by the defendants were brought out by the State during its rebuttal.

The State of Iowa elected to present rebuttal testimony during the trial. One such witness, Shirley Reynolds, testified to statements that were made to her by co-defendant Nuckolls. The petitioner and his co-defendants sought to cross-examine Shirley Reynolds regarding statements made to her by the victim, Sharon Johnson, as to

which defendant actually had sexual intercourse with her which conflicted with the victim's testimony at the preliminary hearing and at trial. The court sustained the State of Iowa's objections that said examination exceeded the scope of direct examination. The trial court further refused to allow petitioner to call Ms. Reynolds as an adverse or hostile rebuttal witness for the defense, or to allow the petitioner to reopen its case in chief and call Shirley Reynolds as his witness. If allowed to testify regarding the statements made to her by Sharon Johnson, Reynolds would testify that Sharon Johnson told her that the blond (referring to defendant Nuckolls) was the individual who had made actual penetration of her. This statement was

contained in Deputy Reynolds Supplemental Police Report regarding the present case and was discovered by defense attorneys only after they had an opportunity to examine her reports following her direct rebuttal examination. The trial court ruled that these were matters which defendants should have gone into in the State's case-in-chief.

On September 1, 1978, petitioner was sentenced by the court to be imprisoned in the Men's Reformatory, Anamosa, Iowa, for a term not to exceed 25 years. Petitioner thereafter appealed his conviction to the Iowa Supreme Court, which transferred the case to the Iowa Court of Appeals. On February 5, 1980, the Iowa Court of Appeals affirmed the petitioner's conviction. On April 4, 1980, the Iowa Supreme Court denied

further review of petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Fifth, Sixth and Fourteenth Amendment rights were violated when his motion for separate trial was denied by the trial court. Petitioner's defenses were inconsistent with the defenses of the other co-defendants, and petitioner was denied full and effective cross-examination of the other co-defendants.

Petitioner was tried jointly with Glen Nuckolls and Jack Eldridge in the case at bar, the trial court having overruled petitioner's oral motion for severance prior to trial. The case of United State v. Graham, 548 F.2d 1302

(8th Cir. 1977) states that severance will be permitted if there is a showing of real prejudice to any individual defendant, and that a case by case approach should be utilized to determine if real prejudice exists. Petitioner submits that he was prejudiced by a joint trial and that his Fifth and Fourteenth Amendment rights to due process and a fair and impartial trial were violated. Petitioner's defenses were antagonistic with the defenses of the other co-defendants and specific behavior was not attributed to each defendant during the trial. Mr. Eldridge admitted to having sexual intercourse with Sharon Johnson. David Adcock and Glen Nuckolls denied having any sexual contact with Ms. Johnson. The prosecutix

testified that it was David Adcock who penetrated her. All three defendants admitted they had been together on that evening and had met the victim and her friend in the downtown Des Moines, Iowa loop area. Prejudice can arise in instances where the defenses of the defendants are antagonistic, where there is danger that an entire line of evidence relevant to only one defendant may be treated as evidence against all defendants simply because they are tried together, and where the evidence would show that a statement by one defendant, made outside the presence of another, would implicate the second defendant. See Brady v. United States, 39 F.2d 312 (8th Cir. 1930); United States v. Borish, 452 F.Supp. 518 (E.D. Pa. 1978). Since their defenses were anta-

gonistic, any hearsay statements of the co-defendants would surely "implicate" Mr. Adcock.

In the case at bar, each defendant took the witness stand in his own behalf. The County Attorney proceeded to examine each defendant after they had testified regarding statements they had made to police officers. None of the defendants denied making statements. The State was permitted by the trial court to present rebuttal testimony by way of police officers during which numerous hearsay objections were made by each defendant's attorney regarding statements made by defendants which these officers testified to. The trial court, on each occasion, gave the jury a cautionary instruction that the evidence then presented could only be

considered against a certain defendant.

It is the petitioner's contention that the trial court erred in overruling petitioner's motion to sever made prior to trial. The inconsistent defenses utilized by each defendant and the subsequent hearsay evidence allowed in the trial was prejudicial and violative of the petitioner's rights to due process and a fair and impartial trial pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Further, petitioner submits that the trial court's attempt to cure this problem by instructing the jury to disregard usage of certain hearsay remarks in judging certain defendants was insufficient and inadequate for the jury to follow and prejudicial to this petitioner.

In the case of Bruton v. United States, U.S. 123, (1968), the Supreme Court established the proposition that the admission into evidence of an out-of-court statement by a co-defendant which implicates another defendant, as to whom the statement is not admissible by virtue of the hearsay rule, is a valid and strong ground for severance of a co-defendant's case. This is true where the defendant who made the statement does not take the witness stand, thus depriving the other defendant(s) of his Sixth Amendment right to confront and cross-examine the declarant. "Where the jury hears the co-defendant's confession implicating the defendant, the co-defendant becomes in substance, if not in form, a 'witness' against the defendant. The defendant must consti-

tutionally have an opportunity to 'confront' such a witness." Nelson v. O'Neil, 402 U.S. 622 (1971).

Petitioner submits that even though all three defendants took the witness stand, he was denied his rights protected by the Sixth and Fourteenth Amendments. The case of Nelson v. O'Neil, 402 U.S. 622 (1971), dealt with the issue as to whether cross-examination could be full and effective where the declarant is present at trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false. In that case, the Court concluded: "Where a co-defendant takes the stand in his own defense,

denies making an alleged out-of-court statement implicating the defendant and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."

The present case can be distinguished from the Nelson case for in this case, none of the defendants denied making out-of-court statements to police officers. Further, this case is unlike Parker v. Randolph, __ U.S.__ , 99 S.Ct. 2132 (1979), in that the statements of the defendants did not constitute interlocking confessions. When the county attorney examined each defendant, not one of them had denied making statements to the police. However, the trial court allowed the State

of Iowa to present rebuttal testimony by way of two police officers concerning statements made by petitioner and defendant Nuckolls which resulted in several cautionary hearsay instructions to the jury.

Petitioner was denied full and effective cross-examination of the other co-defendants in that the statements made by defendants Nuckolls and Eldridge were never introduced into evidence by the State during cross-examination of these individuals, thus Mr. Adcock could not effectively cross-examine Nuckolls or Eldridge as to any statements made by them which implicated Adcock. Petitioner was also denied the benefit of full and effective cross-examination when hearsay statements inculpating him were presented during the State's

rebuttal evidence. Because these officers had not testified to these statements in the State's case-in-chief, defense counsel had no opportunity to request and obtain the rebuttal witness' police reports which contained these statements and the petitioner was not familiar with the statements made by Nuckolls and Eldridge. Thus, petitioner was never afforded the opportunity to cross-examine his co-defendants completely, fully and effectively. This evidence was presented by the State after the defendants had rested. Further, petitioner never had the opportunity to cross-examine his co-defendants regarding these hearsay statements because they were not on the witness stand and available for cross-examination at the time the hearsay

statements were presented to the jury. Clearly, at this point in the trial, the declarants were unavailable for full and effective cross-examination by Mr. Adcock. Bruton v. United States, 391 U.S. 123 (1968). The subsequent hearsay evidence allowed in the trial was prejudicial and violative of petitioner's rights and a Writ of Certiorari should be granted for this reason.

II.

Petitioner's Sixth Amendment right to confrontation was violated when the trial court overruled his request to further cross-examine a state rebuttal witness and refused to allow his motion to call this witness as an adverse or rebuttal witness for the defense.

Deputy Sheriff Shirley Reynolds was

called as a witness for the State of Iowa in its case-in-chief. She was later recalled by the State as a rebuttal witness. At that time, she testified regarding a supplemental police report she had filed. Subsequent to her testimony, defense counsel were furnished copies of those reports. One of these reports contained a statement to the effect that Sharon Johnson had told her that Glen Nuckolls had sexual intercourse with her while the other two defendants were outside the van. This was new information to defense counsel and was not brought out in the State's case-in-chief. The victim had testified on direct examination that it was the petitioner who had had intercourse with her. The trial court refused to permit the defendant to bring this evidence

before the jury by cross-examination of Deputy Reynolds following her rebuttal testimony, by calling her as a rebuttal or adverse witness, or by the re-opening of his case-in-chief. The prosecutor had objected to this line of questioning as being beyond the scope of direct examination.

Petitioner submits that by denying him the right to further cross-examine Shirley Reynolds, his Sixth Amendment confrontation rights were violated. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in State as well as Federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than

being allowed to confront a witness physically. A primary interest secured by it is the right of cross-examination. Davis v. Alaska, 415 U.S. 308 (1974). While the scope of cross-examination is within the discretion of the trial court, if it is unduly restricted, reversible error results and the accused need not demonstrate he was prejudiced thereby. See United States v. Haili, 443 F.2d 1295 (9th Cir. 1971); Thergood v. Tedford, 473 F.Supp. 339 (D.C. Conn. 1978). Further, the test for whether cross-examination about a relevant topic was effective, i.e., whether the trial court has abused its discretion, is whether the jury is otherwise in possession of sufficient information on which to make a discriminatory appraisal of the subject matter at issue. See

Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977).

The State of Iowa had presented Shirley Reynolds as a rebuttal witness to testify to statements made to her by Nuckolls regarding the evening this incident happened. This included questions about the two girls who were in petitioner Adcock's van and whether Nuckolls had stated that he had had sexual intercourse with Sharon Johnson. When defendants obtained copies of Ms. Reynolds police reports after her direct examination, they discovered a statement had been made by Sharon Johnson to the effect that Nuckolls, the blond had intercourse with her when the co-defendants were outside Adcock's van. This information was not available at the State's case-in-chief. Throughout

the entire direct examination of Shirley Reynolds, the County Attorney discussed statements made by Nuckolls concerning this incident. Defense counsel, by questioning Reynolds as to whether Sharon Johnson had stated that she had had intercourse with Nuckolls, was attempting to draw out the entire transaction of events of that evening. This statement was crucial to David Adcock as he had been identified by Johnson as the individual who had had intercourse with her with the other co-defendants outside the van. Defendant Eldridge testified that it was he. This was important for the jury to know. Further, the County Attorney actually went into the substance of that police report on his redirect examination when he was questioning Reynolds

with regard to nicknames used by the defendants. A witness may be cross-examined on subjects directly and indirectly brought out on direct examination. See United States v. McCorkle, 511 F.2d 977 (7th Cir. 1974).

The line between what is and what is not proper examination is often a thin line and cross-examination must be limited with great caution for preservation of a defendant's Sixth Amendment rights. United States v. Houghton, 554 F.2d 1219 (2nd Cir. 1977). The information petitioner sought to elicit on cross-examination was crucial in that it directly impeached Sharon Johnson's credibility. Where material new matters are brought out on redirect examination, the confrontation clause of the Sixth Amendment mandates that the opposing

party be given the right of recross-examination on new issues.

In the alternative, the trial court should have allowed petitioner to present Shirley Reynolds as a rebuttal witness or to reopen its case in chief. Defense counsel had only received this information during rebuttal testimony. The fact that testimony used in rebuttal might have been used as part of the main case does not render it of the matters testified to by the defendant's or the State's witnesses.

Petitioner urges that the jury was deprived of a satisfactory basis for determining the truthfulness of Ms. Johnson's testimony. Further, the information which the petitioner sought to present to the jury was new and material and not cumulative. The

material sought to be introduced by defendant was relevant and showed that the prosecutrix had changed her story. The trial Court's discretion in controlling the extent of cross-examination cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Victory v. Bombard, 432 F.Supp. 1240 (D.C. N.Y. 1977).

The refusal of the trial court to allow the petitioner to pursue this line of inquiry, effectively prohibited the defense from attacking Sharon Johnson's credibility and her strength of memory. As a result, counsel was prevented from exposing to the jury all the facts from which jurors, as sole triers of fact and

credibility, could appropriately draw inferences relating to the reliability of the witness. Had the supplemental police report been introduced, the jury could well have drawn contrary inferences regarding Johnson's credibility. Defendant should have been allowed to present Shirley Reynolds as an adverse rebuttal witness or to re-open its case in view of the surprice information discovered. See Nutter v. United States, 412 F.2d 178 (9th Cir. 1969). The trial court's refusal to allow presentation of this evidence to the jury was prejudicial, an abuse of discretion, and a violation of petitioner's Sixth Amendment rights. For these reasons, a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

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TO THE SUPREME COURT OF THE

STATE OF IOWA

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906 Savings & Loan Bldg.
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515-244-5737

ATTORNEY FOR PETITIONER

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 5, 1980
vs.	)	
DAVID MICHAEL ADCOCK,	)	188/62436
Defendant-Appellant.	)	

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendant appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, asserting trial court erred 1) in overruling his motion for severance; 2) in admitting certain evidence; and 3) in limiting his cross examination of a rebuttal witness for the defense or in not allowing defendant to reopen his case-in-chief. Defendant also alleges he was denied effective assistance of

counsel and, therefore, must be granted a new trial. We affirm on all issues and find defendant was adequately represented by trial court. AFFIRMED.

Alfredo G. Parrish of Parrish & Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Richard L. Cleland, Selwyn L. Dallyn, and Ann Fitzgibbons, Assistant Attorneys General; for plaintiff-appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, J. J.

PER CURIAM

Defendant, David Michael Adcock, appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the

Code 1977, asserting trial court erred: (1) in overruling his motion for severance; (2) in admitting certain evidence; and (3) in limiting his cross-examination of a rebuttal witness, in not permitting the witness to be called as an adverse or rebuttal witness for the defense or in not allowing him to reopen his case-in-chief. Defendant also alleges he was denied effective assistance of counsel and, therefore, must be granted a new trial. We affirm on all issues and find defendant was adequately represented by trial counsel.

The facts are undisputed that Sharon Johnson and a girlfriend, Mary Kennedy, were in downtown Des Moines "scooping the loop" in Mary's car before dawn, January 8, 1978. The three defendants were engaged in the same

activity in a decorated van belonging to defendant Adcock. After some conversation and the exchange of a couple of cans of beer, the five young people ended up in an area known as "Reefer Road," where they smoked marijuana. Subsequently, Mary left the van and drove away in her car. Sharon remained in the van. Mary became concerned and notified police, describing Sharon, the van and her perceptions of the situation. Sometime later Sharon was let our of the van in a highly deserted area on the far northwest side of the Des Moines metropolitan area. She ultimately reached a residence and phoned friends to pick her up. As a result of Mary's communication, the police located Sharon and the defendants. After Sharon told her story to the police, defendant

Adcock and co-defendants Jack Eldridge and Glenn Nuckolls were arrested and charged with sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977,for committing a sex act[1] upon the person

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[1] Under the supplement to the Code 1977, "'sex act' or 'sexual activity' . . . means any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person, or by use of artificial sexual organs or substitutes therefore in contact with genitalia or anus." Section 702.17, supplement to the Code 1977.

of Sharon Johnson by force and against her will on January 8, 1978. The defendants were tried jointly in July 1978. Each was convicted by the jury and sentenced to a term not to exceed twenty-five years.[2]

I. Severance. On March 28, 1978, a motion for joint trial was made by the State to consolidate the trials of Adcock, Eldridge and Nuckolls. This motion was resisted by defendant Eldridge,[3] but the trial court over-

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[2] Appeals on similar issues for all defendants are before this court. See State v. Nuckolls, No. 62455, and State v. Eldridge, No. 62456, decisions filed this date.

ruled the resistance, found the defendants would not be prejudiced by a joint trial on charges arising out of the same occurrence, and ordered the trials to be held jointly. At trial, the three defendants joined in a motion for severance, which was overruled. On appeal, defendant contends he was prejudiced by the joint trial because his defense was inconsistent with those of the other co-defendants. He further claims he was denied the right to fully and effectively cross-examine either of his co-defendants about their extra-judicial statements and trial court's

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[3] Although defendants Adcock and Nuckolls did not formally join in the motion and argument, their counsel apparently were present in the court when the motion was argued.

admonishments to the jury to disregard certain hearsay statements were not sufficient to prevent prejudice.

Rule 6(4)(b) of the Iowa Rules of Criminal Procedure provides for a joint trial, "... if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties." That rule also provides "(w)here jointly tried, each defendant shall be judged separately on each count." While there is no law interpreting this rule, the Iowa Supreme Court previously stated, after the effective date of the new criminal code, a separate trial of defendants who have been jointly indicted "may be had only when the court determines a joint trial would result in prejudice to one or more of the parties." State v. Berry, 247

N.W.2d 263, 265 (Iowa 1976).

In the federal courts, granting or denying a motion for severance rests in the sound discretion of the court and a clear abuse of that discretion must be shown by defendant to warrant reversal of trial court's denieal of a motion to sever. See United States v. Runge, 593 F.2d 66, 73 (8th Cir. 1979); United States v. Rochon, 575 F.2d 191, 197 (8th Cir. 1978). See also 75 Am. Jur. 2d Trial Section 17 (1974). Federal cases also have held a defendant's failure to renew a pretrial motion for separate trial at the close of the government's case or at the close of all the evidence results in a waiver of any right to separate trial. Rochon, 575 F.2d at 197. See also United States v. Lewis, 547 F.2d 1030,

1032 (8th Cir. 1976), cert. denied 429 U.S. 1111, 97 S.Ct. 1149, 57 L.Ed.2d 566 (1977). In the instant case, the motion for severance made at the opening of trial was not renewed thereafter. Without finding a waiver, however, we conclude defendant failed to show any prejudice or confusion resulted from the joint trial that would require reversal. The charges against the three defendants involved common questions of law and facts. There is no showing the defenses of the three defendants were inconsistent, antagonistic, or irreconcilable. See United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); Brady v. United States, 39 F.2d 312 (8th Cir. 19300. There was clear testimony as to the

actions of each defendant; specific behavior or acts were attributed to each defendant; and each defendant took the stand in his own behalf. See Rochon, 575 F.2d at 197; United States v. Graham, 548 F.2d 1302, 1311 (8th Cir. 1977).

We also find defendant's argument regarding the prejudicial effect of alleged hearsay statements to be unpersuasive. This is not a Bruton situation wherein the United States Supreme Court held a cautionary instruction is inadequate to erase the prejudicial effect of trial court's admission into evidence of a non-testifying co-defendant's confession implicating defendant in the crime. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). A defendant's right to

confrontation is abridged in such a circumstance. Id. See also Parker v. Randolph, 442 U.S. U.S. ___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). In the instant case, none of the alleged hearsay statements of the co-defendants implicated defendant. We conclude defendant has established no prejudice.

Defendant also argues he was denied full and effective cross-examination because the prior statements of his co-defendants implicated defendant. We conclude defendant has established no prejudice.

Defendant also argues he was denied full and effective cross-examination because the prior statements of his co-defendants were introduced after the close of defendant's case and, therefore, after the defendant who made

the statement had left the stand. However, defendant made no attempt to call either co-defendant in rebuttal and did not ask to re-open his case for purposes of cross-examination of the co-defendants. Defendnat has waived any right to challenge this aspect of his trial. State v. Uebberheim, 263 N.W.2d 710, 712 (Iowa 1978); State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977).

II. Admission of Evidence. During direct examination of Sharon Johnson, the State sought to introduce into evidence the bra and panties she wore the night of the alleged crime. The articles had been held by law enforcement officers and examined and tested by the Bureau of Criminal Investigation (BCI). Defendant alleges

the first knowledge he and his co-defendants had the panties were blood-stained came during the prosecution's opening statement. On appeal, defendant asserts the panties were not admissible because the State violated its duty to provide continuing discovery by failing to give defendant notice the panties were blood-stained. He further maintains the panties should not have been admitted into evidence because their prejudicial effect on the jury far outweighs their probative value.

Trial court's order for discovery required the State "to permit defendant to inspect, copy or photograph any tangible object pertaining to the alleged crimes" of which the State had

possession, custody or control.[4] All such information was to be delivered to the defendant by May 5, 1978. The state also was required to notify defendant promptly of any additional evidence which was subject to discovery.

It appears from the record defendants, in compliance with the court's order, were given copies of, or made aware of, the report of both the BCI and the examining doctor. Also, defendants were advised the criminologist and the doctor would be called as witnesses. Because these reports were not introduced into evidence at trial, this court cannot verify their exact contents, but the physician's report apparently discussed the presence of blood on the

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[4] Adcock, App. 4.

outer portion of the victim's vagina and two lacerations which appeared on her external genitalia.[5] We cannot ascertain from the record why the BCI report did not mention the blood stain, but we do not find trial court abused its discretion in allowing the panties into evidence for this reason. Defendant had notice and ample opportuntiy to examine the panties prior to trial, but did not avail himself of the opportunity. See State v. Rush, 243 N.W.2d 313, 316 (Iowa 1976); State v. Eads, 166 N.W.2d 766, 772 (Iowa 1969).

We further find the panties' probative value outweighed any prejudicial effect they may have had on the jury. Trial court must balance the

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[5] Adcock, App. at 53.

relevance of the evidence against a possible prejudicial effect and determine "if it tends to shed light upon a material inquiry in the case." State v. Nowlin, 244 N.W.2d 591, 593 (Iowa 1976). In this case defendant was charged with a crime involving force committed against the will of the complaining witness. The challenged evidence is probative as to these elements of the crime. It was not reversible error to allow introduction of this evidence.

III. Limitation of Cross-Examination and Denial of Defendant's Motion to Call Adverse or Rebuttal Witness or to Re-Open Case-in-Chief. Deputy sheriff Shirley Reynolds, one of the investigating officers, was called as a witness for the State in its case-in-chief.

After the State's direct examination of the witness, only counsel for defendant Eldridge proceeded to cross-examine. Deputy Reynolds was recalled as a rebuttal witness for the State after the defense rested. At that time, she gave testimony regarding supplemental police reports she had filed. After Reynolds' rebuttal testimony, defense counsel were furnished copies of the supplemental reports. Counsel for defendant Eldridge called the court's attention to paragraph 28 of one of the reports, which read: "At one time, while one was having intercourse with her, the other two subjects got out of the van. This was while the blonde was having intercourse with her (Glen Nuckolls)."

On appeal, defendant contends his right to a fair trial was abridged by

trial court's refusal to permit him to bring evidence before the jury by cross-examination of Deputy Reynolds following her rebuttal testimony, by calling her as a rebuttal or adverse witness, or by re-opening of his case-in-chief. The thrust of defendant's argument focuses on the issue of credibility. The State's theory of the case was that one of the defendants actually had sexual intercourse with Sharon Johnson and two attempted to do so. At the preliminary hearing and at trial, Sharon Johnson identified David Adcock as the person who had intercourse with her. Deputy Reynolds' supplemental report, based on statements made by the prosecutrix, as quoted above, identified defendant Nuckolls as the individual who actually had inter-

course with Ms. Johnson.

"Granting permission to recall a witness for further examination, either direct or cross, lies largely within the discretion of the trial Court." State v. Hall, 235 N.W.2d 702, 724 (Iowa 1975). Further, the Iowa Supreme Court often has reiterated the principle that the scope of cross-examination is a matter which lies within the sound discretion of the trial court. State v. Ege, 274 N.W.2d 350, 357 (Iowa 1979); State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977); State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974). Likewise, the trial court has wide discretion in re-opening a case for the reception of additional testimony, Davidson v. Van Lengen, 266 N.W.2d 436, 440 (Iowa 1978), State v. Mason, 203 N.W.2d 292,

295 (Iowa 1972), and in determining what is proper rebuttal testimony. State v. Proulx, 252 N.W.2d 426, 432 (Iowa 1977); State v. McCullough, 226 N.W.2d 216, 217 (Iowa 1975); State v. Walker, 218 N.W.2d 915, 919 (Iowa 1974); State v. Willey, 171 N.W.2d 301, 302-03 (Iowa 1969). The trial court's rulings in these areas will not be disturbed except for a clear abuse of discretion. McCullough, 226 N.W.2d at 217; State v. Harrington, 178 N.W.2d 314, 316 (Iowa 1970)

Defendant argues he was not permitted to expose the jury to all facts from which the jurors could draw inferences relating to the credibility of Sharon Johnson. We believe this evidence is merely cumulative on the issue of the victim's credibility. There is substantail evidence in the record to corroborate Sharon Johnson's testimony she did

not consent to sexual intercourse or genital contact with any of the three defendants. To sustain a conviction under section 709.3, it must be proven only that the accused, aided or abetted by one or more persons, committed a sex act constituting sexual abuse on a person in a threatening manner, by force or against the will of the other participant, that is without consent.[6] The question of actual penetration, or which defendant may have made such penetration, does not have to be proven, if all other elements of the offense are proven beyond a reasonable doubt. The uncontroverted testimony illicited from the victim at trial established her perceptions of the events of the evening

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[6] See footnote 1, supra.

were confused and distorted. Further, defendant had an opportunity to question both Sharon Johnson and Deputy Reynolds when they testified in the State's case-in-chief and, with due diligence, could have discovered at that time the extent of Reynolds' investigation. In any event the substance of the supplemental report in this case is not of a nature which would be material or change the results. Bizzett v. Brewer, 262 N.W.2d 273, 278 (Iowa 1978). The relevant issue is whether "...the jury has been deprived of a satisfactory basis for evaluating the truthfulness of the prosecution witness' testimony." State v. Ege, 274 N.W.2d at 356. There has been no deprivation in this case.

We find trial court did not err

in limiting cross-examination of the State's rebuttal witness or in overruling defendant's request to re-open his defense or to call Deputy Reynolds as a rebuttal or adverse witness.

IV. Ineffective Assistance of Counsel. On appeal, defendant contends he was denied effective assistance of counsel for and during the trial of this case. Because defendant alleges violation of a basic constitutional safeguard, we will evaluate the totality of relevant circumstances shown by the entire record. Long v. Brewer, 253 N.W.2d 549, 552 (Iowa 1977). "...'(E)ffective assistance of counsel' does not mean every mistake of judgment or error in trial strategy by an attorney serves to deprive an accused of a constitutional right." Long, 253

N.W.2d at 558. See also Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Iowa has adopted the standard of "the range of normal competency" when reviewing an allegation of this nature. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); Zacek v. Brewer, 241 N.W.2d 41, 50-51 (Iowa 1976). There must be an affirmative factual basis demonstrating counsel's inadequacy of representation. Cleeson v. State, 258 N.W.2d 330, 332 (Iowa 1977); Zacek, 241 N.W.2d at 50. The burden of proof as to each allegation is upon the defendant. Veverka, 271 N.W.2d at 750; Rand, 268 N.W.2d at 648.

Defendant alleges his counsel failed to perform in a competent manner

by making no written motion to sever and by making no objections to jury instructions at trial. Our review of the record leads us to conclude defendant has not shown how these failures have prejudiced him in any way. The motion to sever was presented orally to trial court and was denied. The objection to instructions, which defendant maintains counsel should have made at trial, do not point to any substantive deficiencies in the court's instructions which could have prejudiced defendant. Accordingly, we affirm trial court's judgment and find defendant was adequately represented by counsel at trial.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee-Resister,	)	No. 62436
vs.	)	
DAVID MICHAEL ADCOCK,	)	ORDER
Defendant-Appellant-Applicant.	)	

After consideration by the court en banc defendant-appellant's application for further review is hereby overruled and denied.

Done this 4th day of April, 1980.

THE SUPREME COURT OF IOWA

By /s/ W.W. Reynoldson

W.W. Reynoldson, Chief Justice

Copies to:

Alfredo Parrish
906 Savings & Loan Building
Des Moines, Iowa 50309

Attorney General
Attn: Richard Cleland
LOCAL

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

DAVID MICHAEL ADCOCK,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF IOWA

ALFREDO G. PARRISH
906 Savings & Loan Bldg.
Des Moines, IA 50309
515-244-5737

ATTORNEY FOR PETITIONER

United States Constitution, Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Military when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the state and distict wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

SECTION 709.3, CODE OF IOWA (1979).

A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

1. During the commission of sexual abuse the person displays in threatening manner a deadly weapon, or uses or threatens to use force creating

a substantial risk of death or serious injury to any person.

2. The other participant is under the age of twelve.

3. The person is aided or abetted by one or more persons and the sex act is committed by force or against the will of the other participant.

Sexual abuse in the second degree is a class B felony.

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Alfredo G. Parrish, depose and state that I am the attorney of record for David Michael Adcock, the petitioner herein. Pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing petition for a Writ of Certiorari on each of the parties required to be served herein, as follows:

On the Attorney General, State of Iowa, respondent herein, by mailing three copies in a duly addressed envelope with first class postage prepaid; to Thomas Miller, Attorney General of Iowa, Kermit Dunahoo, Assistant Attorney General, State Capitol Building, Des Moines, Iowa 50319.

Alfredo G. Parrish

Alfredo G. Parrish
906 Savings & Loan Bldg.
Des Moines, IA 50309
515-244-5737

ATTORNEY FOR PETITIONER

Subscribed and sworn to before me this 24th day of July, 1980.

Vicki D. Hallisey

Notary Public - State of Iowa